

United States Circuit Court of Appeals

For the Ninth Circuit

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation), owner of the American Steam-
ship "Beaver",

Appellant,

vs.

LEGGETT STEAMSHIP COMPANY (a corporation),
claimant of the Steam Schooner "Necanicum",
her engines, boilers, boats, tackle, apparel and
furniture,

Appellee.

No. 2969

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation),

Appellant,

vs.

LEGGETT STEAMSHIP COMPANY (a corporation),

Appellee.

No. 2970

BRIEF FOR APPELLANT

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By.....Deputy Clerk.

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Statement of Facts.

The steamer "Beaver", on a voyage from Astoria to San Francisco, and the steamer "Necanicum", en

route from San Pedro to Astoria, were in collision on the 30th day of October, 1913, off the Coast of California. Thereafter appellant, as owner of the "Beaver", libeled the "Necanicum", and appellee, as owner of the "Necanicum", instituted an action *in personam* against appellant. The cases were consolidated and tried before Judge Dooling, who rendered his opinion on the 10th day of December, 1915, dismissing the libel against the "Necanicum" and holding appellant responsible for the damages suffered by appellee, on the ground that the "Beaver" was negligent in proceeding at the rate of 14.7 knots per hour in the fog. The court held that but for such speed and the resulting momentum, due to her size and weight, the collision would not have occurred, and that the speed prevented the rectification, before it was too late, of whatever error arose from confused or contradictory signals. Thereafter appeals in both cases were taken by appellant. A stipulation was entered into consolidating the causes for hearing in this court.

Specifications of Errors.

The assignment of errors will be discussed with respect to the following specifications under which the various assignments are grouped for convenience.

I.

The "Necanicum" was in fault for the collision with the "Beaver" in that she was proceeding in a fog at an immoderate speed.

Assignment of Errors II, III, VIII and IX in Cause No. 2969; 1, 2, 3, 4, 14 and 15 in Cause No. 2970.

II.

The "Necanicum" was in fault for the collision in that she altered her course to port instead of to starboard, and failed to stop in time to prevent the collision.

Assignment of Errors I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XX, XXI, XXII, XXIII, and XV in Cause No. 2969; 1, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 16 in Cause No. 2970.

III

The "Beaver" was not in fault for the collision in that she was not proceeding at an immoderate speed if the court should find that a fog did not prevail.

Assignment of Errors III, XIV, XV, XVI, XVII, and XXIV in Cause No. 2969; 13, 14, 17 and 19 in Cause No. 2970.

Argument.

The steamer "Beaver", south bound from Astoria to San Francisco, and the steamer "Necanicum", north bound from San Pedro to Astoria, came into collision with each other on the 30th day of October, 1913, at a point from 21 to 25 miles south of Pt. Arena on the Coast of California. (Ap. 40, 287). The two vessels were nearly on parallel courses, that of the "Beaver" being about S. E. $\frac{1}{2}$ E. and that of the "Necanicum" approximately N. W. $\frac{1}{2}$ W. (Exhibit 11, Log Book

Entry). The collision occurred at about 2:18 p. m. (Ap. 77, 287), the "Necanicum" striking the "Beaver" on the latter's port bow at an angle of approximately 45° at a point 12 feet abaft the stem.

Notwithstanding that the officers and crew of the "Beaver" testified that the fog had lifted so that immediately prior to the collision they were able to see the "Necanicum" at a distance ahead of about a mile (Ap. 293) and that the officers of the "Necanicum" likewise stated that they saw the "Beaver" when she was from one-half (the master Ap. 134-6) to three-quarters of a mile ahead and the same distance to starboard (the mate Ap. 71), the District Court, in a brief opinion, found that a fog was prevailing and held the "Beaver" in fault for proceeding at a speed of 14.7 knots per hour. That both vessels were in a fog is seemingly borne out by the fact that both claim to have been blowing their fog horns a few moments before the actual impact, and by the testimony of the only disinterested witness called, Mr. Theodore J. Hewitt, a member in high standing of the Portland, Oregon, bar, who described the prevalence of fog in the following words:

"Q. Now, what was the condition of the weather at that time?

A. Well, the weather had been very nice during the forepart of the day and up until just a little while before two o'clock, when we ran into a fog bank,—it seemed kind of to roll up onto us, or we ran into it; rather dense, not very dense, *but quite a heavy fog bank.*" (Ap. 186-7).

I.

THE "NECANICUM" WAS IN FAULT FOR THE COLLISION WITH THE "BEAVER" IN THAT SHE WAS PROCEEDING IN A FOG AT AN IMMODERATE SPEED.

The "Necanicum" was proceeding in the fog at full speed.

If fog was prevailing, then confessedly the "Beaver" was in fault for proceeding at approximately full speed, for she was thereby in breach of Article 16 of the International Rules for the Prevention of Collisions, providing:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions",

and the District Court was right in holding her liable for the collision. But, unless Article 16 is to be abrogated and not to be impartially applied to all steam vessels, and unless every decision of the courts interpreting the rule is to be set aside and disregarded, then *the "Necanicum" was equally in fault*, and the District Court erred in not so holding, *for she too was proceeding at full speed*. This appears from the following testimony of her mate, who was in charge of her navigation from 12:30 o'clock to the time of collision, and from that of her master and engineers.

The mate:

"Q. I don't see any notation in your log of your having reduced your speed from one o'clock in the morning. Don't you note your reductions of speed?

A. Yes, sir.

Q. *Were you running at full speed all that time?*

A. *My watch was.* I am not responsible for the second mate's log.

Q. You were running full speed from the time you went on the bridge at 12 o'clock up to the time of the collision?

A. *What we go by full speed is that the telegraph was on full;* in foggy weather it is customary for the engineer to reduce *slightly* during the time fog signals are going; that is to avoid when you stop the popping off of steam.

Q. Don't you note in your log book any changes of speed you give to the engine-room?

A. Not in all cases; *if we change the speed on the telegraph, if we direct it, we note it.*

Q. *You gave no direction of reduced speed at all?*

A. *I gave none;* whether the captain or second mate did, I don't know.

Q. I am speaking about yourself.

A. I did not.

Q. You were running along your course at regular full speed with your telegraph set at full speed?

A. There was a *slight* reduction in the engine-room.

Q. You do not know anything that happened in the engine-room at all, do you?

A. I have a very good idea it was reduced.

Q. Who told them to reduce the speed?

A. It is their duty.

Q. *Did you ever tell them to reduce the speed?*

A. *I never had occasion to, they had that much sense to do it.*

Q. Will you say you never told them to reduce the speed?

A. No, sir." (Ap. 80).

* * * * *

"Q. *What speed were you making at the time you sighted the 'Beaver'?*

A. *I should judge about eight knots."* (Ap. 84).

The master:

“Q. What speed had you been running in that fog during the morning?

A. Going about seven and a half or eight knots.

Q. *The telegraph was set at full speed all the time, was it not?*

A. *Yes, sir; the telegraph was at full speed, but we had an understanding with the engineers always that when fog set in they were to cut her down so that—*

Q. (Intg.) Did you give them any orders on this particular day to cut them down?

A. I had.

Q. On this particular day you had?

A. Yes, sir.

Q. How did you communicate your orders?

A. By whistle from the bridge.

Q. By whistle from the bridge?

A. Telephone from the bridge, telephone tube.

Q. *What did you say to them?*

A. *Foggy, and to keep her so she would not pop when we stopped the vessel. You did not get my meaning. The standing order of the ‘Necanicum’ was this: in foggy weather when we start to blow fog-whistles they were to cut the steam down so if I stopped the vessel immediately that the vessel would not pop; that is, her safety valve would not break while we were listening for a blast of another vessel, and that order had been carried out all the time I was master of that ship.*

Q. *How much reduction in steam pressure would that mean?*

A. *I do not really know; I am not an engineer.*

Q. If those were the standing orders, why did you give a special order this day?

A. Just saying it was thick fog and to comply with the orders I had given sometime before that.

Q. Have you a distinct recollection of having telephoned down to the engine-room and having given that order this day?

A. I have.

Q. In view of the fact that you had given standing orders?

A. *Somewhere about 10 o'clock I had whistled down and told them it was foggy, getting foggy; it looked as though it was going to get foggy and not to press her too hard.*

Q. *Had you given any orders subsequent to 10 o'clock in the morning?*

A. *No, sir, I had not.*

Q. *How would the man in the engine-room know it was foggy or not?*

A. *He would know by hearing the whistle.*

Q. *By hearing the whistle?*

A. *Yes, sir.*

Q. *And he was supposed to control himself by that whistle?*

A. *Yes, sir of course; unless he was told otherwise.*

Q. *He was not told otherwise after 10 o'clock in the morning?*

A. *He was told at 10 o'clock.*

Q. *I said after?*

A. *It was not necessary.*

Q. *Was it thick fog from 10 o'clock on?*

A. *It was.*

Q. *Up to what time?*

A. *Two o'clock along about that neighborhood.*

Q. *Two o'clock?*

A. *Yes, sir."* (Ap. 127-129).

* * * * *

“Q. *That is about the full speed of that vessel, eight miles?*

A. *That is her limit, unless you set sail on her and drove her before a heavy northwest, and then you might get eight and a half out of her.*

Q. *Captain, from the time you passed Point Reyes up to the time you first sighted the ‘Beaver’ had you had fog all the time?*

A. *More or less, yes; banks of fog.*

Q. *You maintained the same speed right along during that period?*

A. Not when the fog was thick.

Q. *Why don't your log show the reduction of speed?*

A. *Well, we have standing orders on the vessel—*

Q. This is simply then a presumption on your part or an assumption from your standing orders?

A. My standing orders are always carried out on a vessel strictly.

Q. How did you know they were carried out on this morning?

A. I know that they were.

Q. How?

A. Prior to the time of the collision I had stopped the vessel at different times.

Q. For what purpose?

A. To ascertain the position of some other approaching vessel.

Q. What other vessel?

A. We did not see them in the fog.

Q. Don't you know in the fog when you pass vessels?

A. No, sir, we do not know.

Q. How many vessels did you pass that morning?

A. I could not say.

Q. Have you any recollection at all?

A. I would say several.

Q. Why, don't you note in your log when you stop for passing vessels?

A. Well, we just stop the engine—I presume the engineer's log will show that.

Q. Why don't you show it on your log when you stop your engines for fog whistles?

A. It is not customary.

Q. Don't you ever do it?

A. It is not customary.

Q. I am asking you if you don't ever do it?

A. If I was on a fast running vessel I would; on a slow vessel like mine I do not because we do not go too fast at any time. My vessel is a very slow vessel, the slowest on the coast. To

continue answering your question I will say how I know that the steam was reduced is when I had stopped the vessel she did not pop; in other words, she did not blow off any steam, whereas if she was going along at full speed with the steam turned on if I stopped her immediately she would pop right away; that is, her safety valve would work." (Ap. 153-155).

The assistant engineer:

"Q. Where were you at the time of the collision—on watch?

A. On watch; yes, sir.

Q. Did you receive any bells at any time prior to the collision?

A. No, sir.

Q. Did you receive any orders of any kind prior to the collision regarding your engines?

A. No, sir.

Q. Now, understand me, I am speaking—well, within five minutes of the collision, did you receive any orders affecting your engines?

A. No, sir.

Q. Did you do anything to your engines affecting your engines?

A. No, sir.

Q. Do you understand me, Mr. Clough? Did you do anything to your engines prior to the collision? Were your engines reversed prior to the collision?

A. Before the collision?

Q. 'Prior'—I guess you don't understand the word. Did you get any orders from the bridge before the two vessels came together?

A. Yes, sir; I got 'Full speed astern.'

Q. What time did you get that?

A. 2:16 in the afternoon.

Q. How long was that before the collision?

A. That was about two minutes.

Q. About two minutes before the collision?

A. Yes, sir.

Q. *Had you had any orders prior to that time?*

A. *No, sir.*

* * * *

Q. You answered here right along that you made no changes or got no orders prior to the collision. What did you mean by that?

A. *Well, I thought you wanted to know whether I got any orders half an hour or more before the collision, or something like that.*" (Ap. 616-617).

* * * *

"Q. *How many pounds of steam did you have on that day?*

A. *150 pounds.*"

The chief engineer:

"Q. *How much steam pressure did you have on that day?*

A. *150 pounds.*

Q. *Do you know what speed that will develop on her?*

A. *Why, about 8; maybe a little better. 8 knots, maybe a little better than that.*

Q. What is the maximum amount of steam that you carry?

A. *160.*"

* * * *

"Q. Now, you said that your maximum steam pressure on the vessel was 160 pounds?

A. *Yes.*

Q. I want you to look at your log and tell me what the customary steam pressure is that you carry on that vessel. *When you mention that your maximum pressure was 160 pounds, do you mean that her safety valve is set to blow off at 160?*

A. *That is what she blows off at, yes.*

Q. I want you to look through from the time that you left San Pedro on October 26th up to the time of collision and tell me what steam pressure you were carrying right along.

A. *Well, I was carrying 150.*

Q. *Right along, were you not?*

A. *Yes, You see we log 150 pounds there; we give the fireman when we are running along 3 or 4 pounds to go by, that is all; it is logged that way.*

Q. *That is the steam pressure under which you run your vessel day in and day out, 150 pounds?*

A. *Yes, in a fog.*

Q. *Did you have foggy weather from San Pedro all the way up the coast?*

A. *Not all the time, but it was foggy.*

Q. *Show me in your book here where you had more than 150 pounds pressure during the time it was not foggy?*

A. *I do not say we did.*

Q. *Why did you say a moment ago that you carry 150 pounds because it was foggy?*

A. *We never carry over 150 pounds customarily in a fog.*

Q. *Customarily or not customarily do you carry more than 150 pounds?*

A. *If it is nice, clear weather and no prospects of fog, we do—at that time when Captain Keegan was on it we did carry more at some times.*

Q. *Show me on that log on that voyage where there is an entry of more than 150 pounds of steam?*

A. *I possibly cannot; if there is no entry of over 150 pounds we did not carry over 150. I can show it to you further along in the book.*

Q. *Your record in that—*

Mr. DENMAN (Intg.) *Let him finish. What can you show further along in the book?*

A. *Where we carried 155.*

Mr. CAMPBELL. Q. *Do you record in your engine-room log the time when it is foggy and not foggy?*

A. *No, not always.” (Ap. 651-3).*

Thus by the admission of the mate, the “*Necanicum*” was running at full speed during his watch from 12

o'clock to the time of collision. He gave no direction for reduction in speed. He judged his speed to be about 8 knots. The log showed it 8 1/4 knots.

By the confession of the master, who was anything but an open and frank witness, he gave no orders subsequent to 10 o'clock in the morning, when he says that he whistled down to the engine-room and told them (supposedly the engineers then on watch) that it looked as though it were going to get foggy and *not to press her too hard*. Eight miles according to the master *was about the full speed of the "Necanicum":*

"Q. What is about the full speed of the vessel, eight miles?

A. *That is her limit, unless you set sail on her and drive her before a heavy northwest, and then you might get eight and a half out of her."*

Now if any credence is to be attached to the testimony of the master, and whatever may be thought of his credibility he certainly was not wanting in any endeavor to clear his vessel of blame, *the "Necanicum's" full speed was about eight knots, and no order for any reduction in speed had been given at any time, only, at most, a notification of approaching fog and a caution at 10 o'clock not to press her too hard.*

From the testimony of the engineer on watch at the time, he received no bells prior to the collision (not including those at the moment of impact). He carried a steam-pressure of 150 pounds, *the same pressure that had been consistently carried throughout the voyage, fog or no fog.*

And lastly, by the testimony of the chief engineer, the "*Necanicum*" carried a steam pressure on that day of 150, which developed a speed of about 8 knots, maybe a little better than that. Eight knots according to the master was her limit, unless sail was set on her and she was driven before a heavy northwest. 160 pounds was the maximum steam pressure she could carry, and yet the chief engineer could turn to no place in the engine-room log and find a record of more than 150* pounds on that voyage.

A record could not be clearer of a steamer running at her full speed in a fog, without no attempt at moderation. And yet we are not dependent upon the testimony of the "*Necanicum*'s" crew, for indisputable evidence of her speed is found in her log book. From 8:40 a. m. to 9:12 a. m., a space of 32 minutes, the "*Necanicum*" ran by her log a distance of $4\frac{1}{2}$ knots (435 to $439\frac{1}{2}$), at an average speed of $87\frac{1}{16}$ knots per hour; from 9:12 to 12 o'clock, two hours and 48 minutes, she ran $24\frac{1}{2}$ knots ($439\frac{1}{2}$ to 464) at an average speed of $8\frac{3}{4}$ knots per hour; from 12 to 2 p. m., 2 hours, she ran $17\frac{3}{4}$ knots (464 to $481\frac{3}{4}$) at an average speed of $8\frac{7}{8}$ knots per hour; and from 2 to 2:20 p. m., 20 minutes, she covered a distance of $2\frac{3}{4}$ knots ($481\frac{3}{4}$ to $484\frac{1}{2}$) at an average speed of

* An examination of the "*Necanicum*'s" log book (Exhibit 11) will reveal that a crude attempt was made to change the time of collision from 2:20 to 2:25 by converting the 0 into a 5. From 2 p. m. until time of collision, the "*Necanicum*" ran $2\frac{3}{4}$ knots ($481\frac{3}{4}$ to $484\frac{1}{2}$). If the time of collision could be delayed from 2:20 to 2:25 and the running time thereby increased from 20 to 25 minutes, the average speed would have been reduced from $8\frac{1}{4}$ to 6.6 knots per hour. But the District Court found the average speed $8\frac{1}{4}$. The attempted fraud in the log is too palpable for comment.

8 $\frac{1}{4}$ knots per hour. This latter was the speed that the District Court found that she was making. During all of that time a southeast (fair) wind was blowing and fog prevailing. *With her master testifying that 8 knots was her limit unless sail was set, and with the chief engineer stating that with a steam pressure which she carried throughout the voyage, she would develop a speed of about 8 knots, the log established beyond all question that the "Necanicum" was proceeding in the fog at full speed in excess of 8 knots per hour.*

In the light of those facts, extracted solely from "Necanicum's own records and elicited from her officers, the condemnation of the "Necanicum" as in fault for the collision must follow, unless, as we have said, a settled rule of law is to be abrogated and the decisions of the courts are to be waived aside and disregarded in a special dispensation to the "Necanicum" for which no justification exists. This, the District Court did with no word of comment or explanation in its brief opinion upon the navigation of the "Necanicum".

Moderate speed which the law prescribed required a reduction from ordinary full speed.

Article 16 provides:

*"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. * * **

And moderate speed in the fog has been held, without exception, to require a reduction in speed, a speed

substantially less than full speed. This appears from the following leading decisions:

In

The City of New York, 15 Fed. 624,

the steamship "City of New York", capable of making a maximum speed of 13 to 14 knots, was in collision off the New Jersey coast with a sailing vessel while proceeding in a fog at 10 knots. District Judge Brown regarded her speed of ten knots as substantially full speed. He laid down the rule in unequivocal terms that the *moderate speed* prescribed by the statute means *something materially less than full speed*, saying:

"The fog, though not very dense, was sufficient to prevent any observation of the lights, or of the course of vessels, more than about an eighth of a mile distant, and it therefore diminished greatly the ordinary means of avoiding danger. The authorities are quite uniform in requiring a diminution of speed under such circumstances. *Whatever 'moderate speed' may be*, under given circumstances, having reference, as it doubtless does, to the steamer's ordinary speed and her ability to stop quickly, the density of the fog, and the means which vessels have of observing each other, so as to avoid danger, *it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, until the bark was in sight, was a clear violation of the statutory obligation to go at a moderate speed.*"

Can this court say that the "Necanicum" complied with the rule of that case, when she was proceeding in the fog with no reduction in speed?

In

The State of Alabama, 17 Fed. 847,

a collision occurred about thirty miles off the eastern end of the Banks of Newfoundland. The average speed of the steamer found by the court was *eight knots*. There was no satisfactory testimony as to the steamer's ordinary full speed. The court held that if the steamer was going at reduced speed, *the burden lay on her to show that fact to her own justification, and as no such testimony was offered, he assumed that there was no reduction, and that the steamer was going at her ordinary full speed, which was about 8 to 8½ knots per hour.*

In condemning the steamer, District Judge Brown said :

“The failure to slacken speed in this fog, must be set down as one fault in the steamer. *Although the fog was not dense, it was nevertheless evidently such a fog as materially to interfere with the timely observation of other vessels, and therefore increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed.*” (Italics ours.)

Certainly the “Necanicum” did not show any reduction in her ordinary full speed. The evidence was all to the contrary. If, then, as Judge Brown said, no steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed, *it necessarily follows that the “Necanicum” was not*

in compliance with the statutory rule, and her condemnation must follow. The District Court made no attempt to justify the “Necanicum’s” being removed beyond the application of this settled principle of collision law.

The same rule was stated by Judge Coxe in

Clare, Adm’x etc. v. Providence & S. S. Co.,
20 Fed. 535, 537,

in the following words:

“This position would quite likely be well founded if the only questions decided were questions of fact, but it will be observed that in several of the cases referred to, some of which were not presented to the court upon the trial or argument, a construction is placed upon rule 21, that *in all circumstances ‘moderate speed’ means less than usual speed.*”
* * *

“The conclusion derived from these authorities is: That *‘moderate speed’ means moderated speed; reduced speed; less than usual speed.*” (Italics ours).

It was reiterated by Judge Brown in

The Pennland, 23 Fed. 551, 555,

as follows:

“*Assuming that there was a sufficiently dense haze or fog, as her witnesses assert, to require the sounding of the fog whistle at the time when the first whistle was given,—viz., the third blast before the collision,—it was her duty to go at moderate speed under rule 21; that is, reduced speed.*” (Italics ours.)

And again, in

The City of Atlanta, 26 Fed. 456,

the court said of the rule, in condemning “*The City of*

Atlanta” for proceeding at nine knots 50 miles off the Virginia coast:

“The average full speed of *The City of Atlanta* was nine knots. Up to the time when the fog horn of the *Foley* was heard, she had not materially slackened her speed on account of the fog. * * *

“*Moderate speed means ‘reduced speed’* * * * *The City of Atlanta* did not *substantially* reduce her speed at all, although she was sounding fog signals. She was sailing, therefore, in violation of article 13 of the rules of navigation.” (Italics ours.)

In

The Britannic, 39 Fed. 395,

Judge Brown held both the “*Celtic*” and the “*Britannic*” in fault for running in violation of the statute because they were under *substantially* full speed in a fog, for each was proceeding at a speed but one knot less than full speed. *What justification is there, then, for holding the “Necanicum” free from fault when she was proceeding, as the record of her log shows, at her ordinary full speed?*

The same court commented at length upon the rule in

The Normandie, 43 Fed. 151, 157,

saying:

“With improvements in steam engines, and increased facilities for handling, it is not impossible that one-half the maximum speed when full power is held in reserve for immediate use in emergencies may come to be held a moderate speed, even in a dense fog, in those parts of the high seas where other vessels are not specially liable to be met. But the speed of the ‘*Normandie*’ in this case was more than one-half of her maximum speed. *There is no case in the courts of this*

country where a speed of two-thirds of the maximum speed under such circumstances as the present, has been held to be moderate speed within article 13."

Later, in

The Niagara, 77 Fed. 329,

Judge Brown enforced the rule in a case arising out of a collision off the coast of Virginia, saying of its application to a steamer going *nearly* at full speed:

"The speed of the steamer was from nine to ten knots or nearly her full speed, and the fog was dense. Though the steamer was a little off from the straightest route, she was not in an unfrequented part of the ocean, and no precedent warranted holding nearly full speed of from 8 to 10 knots to be the 'moderate speed' that the statute requires. It must, therefore, hold the steamer liable."

In

Spencer on Marine Collisions,

the author states the rule in the following language:

"The courts, however, hold that no steamer's speed is moderate in the sense of the rule so long as she is going at her *ordinary* full speed."

The rule is unequivocally stated in

25 Amer. & Eng. Encyc., at 986,

as follows:

"Ordinary full speed is *never* considered moderate speed." (Citing cases).

The rule is thus so well established and so clear that the *moderate speed prescribed by the statute means reduced speed* that nothing can be gained by further

citation of cases with which the reports are replete. This court, however, recognized its existence in its late decision in

The Oceania Vance, 233 Fed. 77,

wherein it held a sailing vessel at fault for proceeding at a speed of $6\frac{1}{2}$ to 7 knots an hour, Circuit Judge Ross saying:

“The same rule in respect to the *necessity of slackening speed in foggy weather* that applies to steamers is equally applicable to sailing vessels.” Citing *The Chattahoochee*, 173 U. S. 540. (Italics ours.)

If then, fog prevailed at the time of the collision between the “Beaver” and “Necanicum”; if under those circumstances both vessels were by a statutory rule of law required to go at a moderate rate of speed; if moderate speed means a reduced speed, less than ordinary full speed, as all the decisions hold wherein the question has received consideration; and if, as the record from the lips of her officers and from her log book undeniably shows, the “Necanicum” was going at her ordinary full speed,—on what ground is this court at liberty to depart from adjudications which have so finally settled the rule of law? No reason exists, we submit, for making the “Necanicum” a special exception to the rule, and yet that is precisely what the lower court did with no citation of precedent and with no word of justification, or even of explanation. It was error, which in justice this court should correct.

Speeds of less rates than that of the "Necanicum" have been held excessive.

By the master's testimony, the "Necanicum's" speed at the time the "Beaver" hove in sight was 8 knots an hour; by her log, her average speed for the twenty minutes immediately preceding the collision was $8\frac{1}{4}$ knots an hour, and for the two hours previous to that $8\frac{7}{8}$ knots an hour, before a southeast wind. Throughout that time, a fog prevailed, if credence is to be given to her log book entries, as must be done against her. *Such speed has been condemned time after time as excessive.*

In the latest decision of this court,

The Oceania Vance, supra,

the sailing vessel was held in fault for a speed of $6\frac{1}{2}$ to 7 knots. And the court remarked that

"Speeds much less than 6 knots have frequently been condemned." Citing cases. (Italics ours.)

What then of a speed of $8\frac{1}{4}$ knots in a fog? Can it be possible that this court will sanction and announce to the shipping world a rule whereby a steam vessel proceeding at $8\frac{1}{4}$ knots, ordinary full speed, in a fog in the path of vessels passing up and down the frequented California coast, shall be held to be navigating within the statutory rule, mandatorily prescribing "moderate speed"? If so, what becomes of the precedent of

The Oceania Vance,

going at a rate of from $11\frac{1}{4}$ to $13\frac{1}{4}$ knots less, and of this court's decision in

The Belgian King, 125 Fed. 869,

wherein, in a collision occurring in the vicinity of the one in the present case, Circuit Judge Morrow, delivering the opinion of the court, held that the "Belgian King" was not going at a moderate rate of speed when proceeding at *half speed* (not full speed) at 8½ knots an hour?

In

The Michigan, 63 Fed. 280,

the Circuit Court of Appeals for the First Circuit, speaking through District Judge Hughes, said:

"*Five to six knots* an hour is too great a speed to move with in a fog over waters always as *full of vessels* of every kind as the waters at the entrance of the Virginia Capes. * * * (Italics ours.)

In

The Harold, 84 Fed. 698,

District Judge Brown held the schooner "Crockett" liable for a collision with the tug "Harold" because of an immoderate speed of six knots, saying:

"The schooner had nearly all sails set in a fresh wind, and was going at a speed of *six knots*; this plainly was not the moderate or reduced speed required in a fog by Article 13." (Citing cases.) (Italics ours.)

In

In re Clyde S. S. Co., 134 Fed. 95,

District Judge Adams laid down the rule that *six knots* is an excessive speed for a steamship in a fog in a frequented part of the ocean, and charges the vessel

with fault where collision occurs (the court cited numerous cases).

In

The Furnessia, 137 Fed. 955,

where a collision occurred between two vessels approaching New York at night in a fog, 15 miles east of Fire Island lightship, the court held *six knots* to be an excessive speed. Of it District Judge Adams said:

“If her speed was only *six knots*, it was too much in such a fog.” (Italics ours.)

In

The Tremont, 160 Fed. 1016,

a case arising out of a collision on Puget Sound, District Judge Hanford held the “Tremont” in fault for proceeding at the rate of *six miles* per hour in the fog. The decision was affirmed by this court in 161 Fed. 1.

The Circuit Court of Appeals for the Second Circuit in

The Delaware, 213 Fed. 214,

condemned the steamship “Delaware” for proceeding in the fog at a speed of $6\frac{1}{4}$ *knots* while entering New York Bay.

And the Supreme Court of the United States in

The Steamship Martello v. Willey, 153 U. S. 64, 38 L. ed. 637,

adjudged the steamship “Martello” in fault for a collision with the “Willey” because she was proceeding at an immoderate rate of speed of from $5\frac{1}{2}$ to 6 *knots* near the entrance to New York harbor.

A speed of seven knots has been frequently condemned as immoderate.

In

McCabe v. Old Dominion S. S. Co., 31 Fed. 234, a collision occurred a short distance south of Scotland Lightship off the New Jersey coast during a fog, between the steamships "Seneca" and "Wm. McCabe".

In holding the "Seneca" at fault, the court said:

"The admitted speed of the 'Seneca' is *seven miles*. The evidence proves that it must have been greater, though it is impossible to fix the exact rate. Enough has been said to condemn her for negligence in this respect, and to make her *prima facie* responsible for the collision." (Italics ours.)

Again, in

The Wyanoke, 40 Fed. 702,

seven knots was held to be too great a speed in a fog on the open sea off Cape May. The court said that seven knots in a dense fog at night was an immoderate speed for a steamer whose full speed was only 10 to 11 knots.

In

The Catalonia, 43 Fed. 396,

a collision occurred 30 miles northeast of Highland light in a thick fog between the "Catalonia", bound on a voyage from Liverpool to Boston, and the "Rebecca A. Taulan," proceeding from Richmond, Maine, to Philadelphia. Both vessels were held in fault for the collision, the steamer being condemned for going at an immoderate speed of *seven knots*.

Seven knots was likewise condemned by the Supreme Court of the United States as excessive in

The Pennsylvania, 19 Wall. 125, 22 L. ed. 148, wherein a collision occurred 200 miles off Sandy Hook.

An *eight knot* speed has been held excessive.

In

The City of Panama, Fed. Cas. 2764,

District Judge Hoffman, sitting in the court below, condemned the steamer for proceeding at the rate of *eight miles* an hour in a fog in the usual track of vessels approaching San Francisco harbor from ports to the northward.

In

The Westphalia, Fed. Cas. 17460,

District Judge Benedict held the steamship "Westphalia" liable for a collision in the English Channel in a fog in the daytime because she was proceeding at from *8 to 9 knots*. The court said that such a speed was unlawful, and that even a speed of *seven knots*, could not be justified.

Eight miles an hour was held to be excessive in

The Leland, 19 Fed. 771,

wherein the court condemned the steamer for proceeding at that rate, 17 miles off the west shore of Lake Michigan.

In

The State of Alabama, 17 Fed. 847,

the court held the steamer in fault for maintaining a speed of from *8 to 8½ knots* at the time of a collision

occurring 30 miles off the eastern end of the Grand Bank of Newfoundland.

The weight of authority thus condemns the speed of the "Necanicum" as excessive.

With vessel after vessel held in fault for going at speeds less than their normal full speeds, and below the ordinary full speed at which the "Necanicum" was proceeding, the latter should be deemed in fault. To hold, on the one hand, that a fog was prevailing which thereby brought into operation rule 16, requiring a moderate speed on the part of the "Beaver", and, on the other hand to say that the "Necanicum" was not likewise required to obey the mandate of the rule by reducing her speed, but could lawfully proceed at the same rate as before the fog set in, would not only constitute a biased and partial application of the rule, but would effectually detract from the obligation of the rule as it has been established and enforced by every court, save in the present instance.

To uphold the decision of the lower court in the face of the undisputable admissions of full speed will work chaos where uniformity is essential to safe navigation. If this court shall say to the shipping world that the "Necanicum" may go uncondemned despite the fact that she confessedly did not reduce her speed to moderate, although the rule is all-inclusive in its scope, for by its terms it applies to *every* vessel (not every vessel *but* the "Necanicum"), its act will be the pronouncement of a new rule in conflict with the settled adjudications of every other court.

The rule is statutory, having been adopted by an Act of Congress of August 19, 1890 (26 Stat. at L., p. 320, Chap. 802), and becoming effective by a proclamation of the President (26 Stat. at L., p. 1250) on the 1st day of July 1897. The "Necanicum" by her violation of it brought herself within the application of the burden of proof rule first laid down by the Supreme Court in

The Pennsylvania, supra,

and recently reapproved by the Supreme Court in

Lie v. San Francisco & Portland S. S. Co., U. S.

Adv. Ops. 1916, at p. 270,

affirming a judgment of this court in

The Beaver, 219 Fed. 134,

wherein the court said:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

By her failure to reduce her speed to moderate, the "Necanicum" thus had cast upon her the burden of showing not only that it probably was not, but that it could not have been, one of the causes of the collision. Manifestly, she has not sustained this burden, because it clearly appears that had she been proceeding at a reduced speed, the collision would never have occurred. As it was, it only failed of being averted by the nar-

rowest possible margin. She certainly has not shown that the collision would still have occurred if her speed had been reduced. Failing it, she must be held in fault.

II.

THE "NECANICUM" WAS IN FAULT FOR THE COLLISION IN THAT SHE ALTERED HER COURSE TO PORT INSTEAD OF TO STARBOARD AND FAILED TO STOP IN TIME TO PREVENT THE COLLISION.

The "Necanicum" altered her course to port.

The testimony of the master of the "Beaver" was to the effect that he went to the bridge at about five minutes past 2 o'clock in response to a report from the second officer, who was on duty, that it looked like it was going to set in foggy. At that time, he could see three or four miles, and thereafter the fog began coming down light, drifting. At 2:14, he first saw the "Necanicum" and at the same instant it was reported by the lookout (Ap. 287-8, 293). She appeared to be right ahead, a little, if anything, on the port bow (Ap. 293). The automatic fog whistle, a large deep whistle, had been blowing from the time the master went to the bridge, and on seeing the "Necanicum", he ordered it shut off, and thereupon blew the "Necanicum" a one-blast passing whistle (Ap. 295). At the same time, he ordered his helm ported, and waited about 30 seconds for a reply. Not receiving any, he blew a second whistle, and shortly after that, it might have been 30 seconds or thereabouts, they heard a single blast whistle from the "Necanicum" (Ap. 295). The "Beaver" continued to swing to starboard under her ported helm, and, contrary to the whistles which

had been exchanged, the "Necanicum" starboarded her helm, instead of porting it, and began to swing toward the "Beaver". At that time, the vessels were approximately half a mile apart (Ap. 295-7). As soon as the master of the "Beaver" saw the "Necanicum" coming to port toward him under a starboard helm in violation of the whistle, he hard aported, backed the "Beaver" full speed, and blew three whistles (Ap. 296, 303-305). The "Necanicum" continued to swing toward the "Beaver", and finally struck her at about an angle of 45 degrees, approximately 12 feet from the stem (Ap. 296).

The master was corroborated by the lookout in the fact of first seeing the "Necanicum" a little on the port bow, of the passing whistles blown, and of the "Necanicum" altering her course to port and into the "Beaver" (Ap. 449, 451-3). The second officer, on the bridge, likewise testified to calling the master, to the starting of the automatic whistle, to seeing the "Necanicum" coming out of the fog almost ahead, a little on the port bow, and to the subsequent whistles and changes in the "Beaver's" course and speed as stated by the master (Ap. 353-7). The "Necanicum", said the second officer, came toward the "Beaver" under a starboard helm and struck her about 12 feet from the stem on the port bow (Ap. 358-9). The quartermaster, a seaman of 45 years' experience, corroborated the blowing of the automatic fog horn, the two single blast passing whistles and the three reversing whistles blown by the "Beaver", and of the altering of the "Beaver's" course to starboard (Ap. 471-2, 476-9). He saw the "Necanicum" approach at what

he thought was nearly right angles, and strike the "Beaver" (Ap. 473). The chief officer heard the "Beaver's" two whistles, the "Necanicum's" answering whistle, while in his room beneath the bridge (Ap. 432-3). On hearing the bridge telegraph ring, he came on deck and saw the "Necanicum" approaching on the port bow (Ap. 433). From the time he saw the "Necanicum" she was swinging towards the "Beaver" under a starboard helm (Ap. 435).

Thus by all of the officers and crew of the "Beaver" on watch, the "Necanicum" when first observed was approaching slightly on the "Beaver's" port bow. The latter blew a one-blast whistle, indicating an intention to direct her course to starboard and to pass port to port. No response being received, the whistle was repeated, and was thereafter answered by a like whistle from the "Necanicum". Instead, however, of complying with the signal, the "Necanicum" changed her course to port under a starboard helm and struck the "Beaver" on the latter's port bow. The "Necanicum's" alteration of course to port instead of to starboard and her failure to stop precipitated the collision.

The testimony of the officers and crew of the "Necanicum" as to the relative positions of the two vessels when they came into view of each other from the fog, the whistles blown, and the changes in courses, is absolutely contradictory to that of the officers and crew of the "Beaver", save as to two significant facts, viz., the blowing of a one blast whistle by the "Beaver" and the *starboarding* of the "Necanicum's" helm.

The mate of the "Necanicum" testified that he first sighted the "Beaver" 12 to 15 degrees on his starboard bow about seven or eight miles away; that from the course she was then on, she should have passed the "Necanicum" a mile off to starboard; that she was then shut out by the fog and when he next saw her two or three minutes before the collision, her bearing had widened and she was then on the starboard bow between three and four points at a distance of three-quarters of a mile and three-quarters of a mile to starboard, (Ap. 32-3, 42, 54-5). That there may be no mistake as to his exact words, for we are now dealing with probabilities, we quote them:

"Q. After you saw the 'Beaver' seven or eight miles away, about 15 degrees on your starboard bow, so that she would pass you a mile off, as I understand you to say? A. Yes, sir.

Q. How long did you see her?

A. Several minutes.

Q. How many minutes? A. Three or four.

Q. Three or four minutes? A. Yes, sir.

Q. How long was it that she was shut out by the fog?

A. Oh, from shortly after 2 o'clock until the collision occurred—shortly before, about two or three minutes before the collision occurred.

Q. At that time where was she?

A. She was coming down the coast; had she proceeded on her course she should have been about a mile or so inside.

Q. *Where was she at the time you saw her at 2:15, or three minutes before the collision?*

A. *On our starboard bow.*

Q. *Whereabouts was she on your starboard bow?*

A. *I should judge between three and four points; about three.*

Q. How many degrees, about?

A. There are 11 and a quarter degrees to a point.

Q. That was two or three minutes before the collision? A. Yes, sir.

Q. *How far distant was she?*

A. *Oh, in the vicinity of three-quarters of a mile.*

Q. *How far off your starboard bow would that make her?* A. I can figure it out by—

Q. What is your judgment?

A. *Had she proceeded on her course she would have passed three-quarters of a mile.*

Q. That is the time you first saw her?

A. No, sir.

Q. *At the time you saw her two and a half or three points before the collision, how far off was she?* A. Do you mean in miles or feet?

Mr. DENMAN. The question is confusing to the witness.

Mr. CAMPBELL. Q. How far off was she from you at the time you saw her two and a half or three minutes before the collision when she was three points on your starboard bow?

A. *Three-quarters to one mile.*

Q. *Three-quarters to one mile?* A. Yes, sir.

Q. At that time you say her bearing had widened? A. Yes, sir.

Q. How much? A. From 15 to 33 degrees.

Q. *How far ahead of you did you judge her to be at that time?* At the time—what time?

Q. Three minutes before the collision when you saw her three points?

A. *She would be three-quarters of a mile.*

Q. *How far off to one side?*

A. *Between one-half and three-quarters of a mile.”* (Ap. 54-5).

At the time he then saw her, the mate says that he starboarded his helm, blew two blasts of his whistle and received no response, but instead, the “Beaver” ported her helm and changed her course sharply across

the "Necanicum's" bow. This describes a maneuver on the part of a large, fast passenger vessel in the open ocean so unusual and so utterly senseless, for no exigency of situation existed to suggest or necessitate it, that we again take the mate's own words to avoid the possibility of misunderstanding:

"Q. When did you next see her?

A. Two or three minutes previous to the collision.

Q. Where was she when she came in sight?

A. She was on the starboard bow, her bearing had widened.

Q. What, if any, orders did you give at that time? A. At the time I seen her?

Q. Yes? A. *I starboarded my helm.*

Q. What did you say?

A. *Starboard your helm, and sounded two blasts of the steam whistle denoting my intention of passing him on his starboard side.*

Q. Whereabouts on the bridge were you at this time? A. Both sides.

Q. Walking back and forth?

A. Backwards and forwards; yes, sir.

Q. Did you get any response from him?

A. The response was not discernible to the ear.

Q. *Did you see anything from him?*

A. *I seen evidence of steam or something from his whistle, I do not know what it was, making no sound.*

Q. How many blasts as far as indicated by sight?

A. I could not tell, *I surmised it was one.*" (Ap. 33-4).

* * * * *

Q. At that time you blew, as I understand your testimony, two blasts? A. Yes, sir.

Q. She was in plain sight of you?

A. Yes, sir." (Ap. 55).

* * * * *

Q. *You had then heard no response from the 'Beaver'?*

A. *I heard no response, but took it evidently that she sounded one whistle, because she altered her course sharply across the bow.*

Q. Did you see that? A. Yes, sir.

Q. What did you do then?

A. Called the captain's attention to it.

Q. Where was he? A. On the bridge.

Q. Why did you have to call his attention to it?

A. It was my duty; he already seen it, but it was my duty.

Q. What did you say to him?

A. I says, 'What is he going to do; what the hell is he going to do?' I says.

Q. What did the captain do then?

A. Placed his hand on the telegraph and says, 'My God! What is that man going to do?'

Q. What did he do then?

A. When we determined that the vessel was attempting to cross our bow he gave her full speed astern on the telegraph sounding three blasts of the whistle denoting the engines were going full speed astern.

Q. At the time the 'Beaver' altered her course to starboard, did you give the danger signal?

A. She altered her course to port.

Q. She altered her course to starboard?

A. That is port helm.

Q. Is that altering it to starboard?

A. The vessel goes to port.

Q. That is altering her course to starboard under a port helm? A. Yes, sir.

Q. Did you give the danger whistle?

A. Three whistles denoting we were going astern.

Q. At the time the 'Beaver' was from one-half to three-quarters of a mile ahead of you?

A. Yes, sir." (Ap. 58-9).

The "Necanicum's" helm was starboarded, which, the court will bear in mind, would swing her exactly as

those on the "Beaver" testified she did swing. There can be no mistake about the change of helm. We quote the words of the man who ordered it:

"Q. You thought there was going to be a collision?

A. I surely did, the way the other ship acted.

Q. *What was done with the helm of your vessel?*

A. *Starboarded.*

Q. *Starboarded?* A. *Yes, sir.*

Q. *And you swung off to port?*

A. *To port; yes, sir.*

Mr. DENMAN. At what time?

Mr. CAMPBELL. Just a moment. I object to counsel interrupting the cross-examination at this point.

Mr. DENMAN. What time of changing the helm are you referring to?

Mr. CAMPBELL. I seriously object to counsel breaking in on the cross-examination; he knows it is not right.

Q. *What time did you order your helm to starboard, when you blew your two blasts?*

A. *When I blew the two blasts.*

Q. *What was the order you gave?*

A. *Starboard your helm.*

Q. *Did the quartermaster do it?* A. *Yes, sir.*

Q. What kind of steering gear have you got?

A. Rods, ropes and chain.

Q. What kind of a steering apparatus have you?

A. Wheel hand gear.

Q. Hand gear? A. Yes, sir.

Q. Did he alter his course?

A. At what time? Yes, he altered his helm.

Q. Did you alter the course of your vessel?

A. Must have altered it to some extent. The master was on the bridge at that time; I don't know what he did.

Q. Did you watch it?

A. No, sir; the captain was on the bridge in command.

Q. Who gave the order, did you? A. Yes, sir.

Q. Why didn't you watch it?

A. *He put his helm to starboard; I had business other places.*" (Ap. 59-61).

"Q. Your judgment is you did continue to swing to port under a starboard helm?

A. *She had started to swing to port.*

Q. When you left the bridge?

A. I did not leave the bridge when I took up other duties." (Ap. 62).

The master also testified to the "Beaver" being on the starboard side and of altering her course to starboard. We quote him:

"Q. When did you next see the 'Beaver'?

A. About somewhere around 2:20, I would judge.

Q. Where were you when you next saw her?

A. I was on the starboard after-deck of the 'Necanicum'.

Q. Where had you been just before that?

A. In the toilet.

Q. Where is that situated?

A. On the starboard after-deck.

Q. Where was the 'Beaver' when you then saw her with reference to your vessel?

A. *When I again saw her she was on our starboard bow.*

Q. *Whereabouts on the starboard bow, how many points about?* A. *About two points.*" (Ap. 119).

Q. What did you do when you saw the 'Beaver'?

A. *I went on the bridge.*

Q. *Were any signals blown from your vessel to the 'Beaver'?*

A. *When I arrived on the bridge my first officer blew two blasts to the 'Beaver'?*

Q. What, if any, orders were given from your first officer?

A. *I heard my first officer say, 'Starboard your helm.'*

Q. What was done then, or what did you see then?

A. *I saw the 'Beaver' alter her course sharply across my bow.*

Q. What did you do then?

A. I ordered the helm hard aport, and backed the vessel full speed astern; backed my vessel full speed astern. I gave three blasts of my whistle to indicate that I was going full speed astern, or, in other words, that my engine was reversed.

Q. How long was it between the time that the order was given to starboard the helm to your order hard aport with the reversing?

A. Well, *at a rough estimation* I would say about 10 seconds; that is a rough guess.

Q. Was it any considerable lapse of time, Captain?"

"A. No considerable lapse of time; just a rough guess.

Q. Had you in the interim seen the vessel turning to her starboard?

A. *I saw the vessel swing sharply across my bow; our vessel's bow.*

Q. Did she ever get clean across your bow prior to the collision?

A. Well, I would say she was on an angle of about with our keel, I would say 50 degrees across our bow when she struck. Prior to the time of the collision both vessels, I presume, were backing; mine was backing." (Ap. 120-1).

* * * * *

"A. The second time I saw her she was two or more points on my starboard bow; two points I would roughly say, in that neighborhood.

Q. Then you say she began to swing across your bow. Then came the order porting your helm and reversing full speed astern?

A. We saw the 'Beaver' on our starboard bow. When I came out of the toilet I saw the whole starboard side of the 'Beaver' plainly. I then went on the bridge and as *I was approaching the bridge* the first officer gave *two blasts of his*

whistle to the 'Beaver' of the 'Necanicum's' whistle. I then saw the 'Beaver' alter her course sharply across our bow; she answered our two blasts with one; I backed my vessel full speed astern and ordered my helm hard aport." (Ap. 122).

On cross-examination he stated:

"Q. When you saw her the next time did you find her where you expected she would be from what you had seen of her when you left the bridge?

A. When I next saw her I saw her on my starboard bow; I saw her whole starboard side and she appeared to be a little closer than she should have been, but there was plenty of room to pass.

Q. I will again ask you the question. When you saw her the second time was she in the position you expected to find her bearing in mind the position you had last seen her when you left the bridge? A. I have answered that question.

Q. Answer it again. A. She was a little closer.

Q. How much closer?

A. I would say—what do you want, in miles or feet?

Q. Whichever way serves your purpose best.

A. I would say she was closer than I expected to find her.

Q. In your judgment then when you came out of the lavatory you thought she had altered her course? A. I thought she had.

Q. And swung towards you?

A. It struck me she must have in order to get that close to me. However, when I saw her after I came out of the lavatory *I saw her whole starboard side more than half a mile off.*

Q. *That was more than half a mile to starboard to you?* A. *To the starboard of me.*

Q. And how far ahead of you?

A. Bearing about two points I would safely say.

Q. *At what distance ahead?*

A. *I just said half a mile or more.*

Q. *How far to starboard would you say, half a mile?*

A. *I would roughly guess about that; more.*

Mr. DENMAN. I want to ask counsel what he means by 'how far to starboard?'

Mr. CAMPBELL. My question was understood. The witness does not need to wink to his counsel either.

The WITNESS. You asked me that question three or four times over and you do not give me a chance to answer the question.

Mr. CAMPBELL. I will give you all the opportunity you want.

The WITNESS. I am telling you the truth in this matter and nothing but the truth.

Mr. DENMAN. What does counsel mean by half a mile to starboard. Do you mean by that half a mile abeam of the vessel or off; I really do not know.

The WITNESS. I do not know what he means either.

Mr. CAMPBELL. If counsel makes another suggestion to the witness perhaps the witness will follow up the suggestion again.

The WITNESS. I want——

Mr. DENMAN (intg.). Let him put the question and you answer it.

The WITNESS. I want to answer that last question this gentleman asked me. How far would she pass me if she had continued on her course. *She would have passed me half a mile or probably more had she continued on her course.*" (Ap. 134-6).

* * * * *

"Q. *You say you heard an answer to your two whistles, you hearing one whistle from the 'Beaver'?* A. *I did.*

Q. *Distinctly?*

A. *I heard the blast of the whistle.*

Q. *You had no difficulty in hearing it?*

A. *None whatever.*" (Ap. 138).

"A. I was approaching the bridge when Mr. Beckwith blew the two blasts to her.

Q. Where were you when you saw the "Beaver" alter her course?

A. I was on the bridge at the time she pulled herself across our bow, and then gave me one blast.

Q. Did she alter her course before or after she gave you the one blast?

A. She altered her course about the time she gave me the one blast.

Q. Then you were on the bridge at the time you *heard the one blast*? A. *I certainly was, yes.*

Q. Where were you at the time that the two blasts were given by your chief officer?

A. Approaching the bridge." (Ap. 140-1).

"Redirect Examination.

Q. You do not mean to say, do you, that when you see her one-half a mile distant two points on your bow that she will be half a mile distant when she was abeam to you?

Mr. CAMPBELL. Objected to as leading and cross-examination of his own witness.

A. I have not said she was.

Mr. DENMAN. Q. I understood you to say that.

A. All I say is that she had ample room to pass had she continued on her course.

Q. You did say in answer to a question by Mr. Campbell that you saw her one-half a mile distant two points *or* your starboard bow and then you said afterwards to him that she would pass you half a mile and over on your starboard side from that position on a parallel course. I want to ask you—

A. (Intg.). *I never said she would pass me half a mile when she passed me abeam.*

Mr. CAMPBELL. We object to counsel's cross-examination of his own witness. The witness plainly testified as to what his recollection was at that time.

THE WITNESS. *I did not say she would pass me half a mile. I said when she was two points she was half a mile or more distant; how much more I would not say. I never did state she passed me half a mile.*

MR. DENMAN. Q. *My impression is the record will show you made such an answer. I would like to know what your opinion was in regard to the distance she would pass you from the position you last saw her as you stepped out of the toilet.*

A. *I would say she would have passed a good safe distance.*

Q. *Would it be such a distance as is represented on the chart which we put in here?*

A. *It should be at least had she continued, she would have passed me at a good safe distance.*

Q. *On the inside?*

A. *Inside of me. I don't remember having stated at any time the vessel passed me half a mile inside of me when she was abeam of me.*

MR. DENMAN. *I offer this in evidence as Claimant's Exhibit 1.*

(The chart is marked 'Claimant's Exhibit 1.')
(Ap. 159-161).

* * * * *

Recross Examination.

MR. CAMPBELL. Q. *What did you mean by stating to me as my recollection is that you did, that when you first saw the 'Beaver' you then judged her to be on such a course that she would pass you about a mile to starboard?*

A. *I figured she would pass me a mile to starboard."* (Ap. 162).

* * * * *

Q. *Is it not a fact that when you first saw her after you came out of the lavatory that you thought at that time that she was in such a position that she would, if she held her course pass you about half a mile distant?*

A. *No, sir; I stated that I saw her about two points, in that neighborhood, on the starboard*

bow, and I saw the whole starboard side of the 'Beaver,' and I figured that if she carried on as she was going, kept her course, she would pass well clear of us. I did not state at any time how far she would pass us.

Q. You said to me on direct examination in answer to my question she would pass you about half a mile? A. When she was abeam?

Q. Yes. A. *See if you can find that.*

Q. And you said she would pass perhaps a little more. A. *I do not think so.*" (Ap. 162-3).

* * * * *

"Q. When you came out of the lavatory you said she had changed her course somewhat, so as to bear in closer to you?

A. Yes, sir; she must have; she was closer than I expected she would be.

Q. At that time you said that you thought she would pass you one-half a mile to your starboard. Why do you change your testimony?

A. I say I saw her after coming out of the lavatory two points, in that neighborhood; she was well on our starboard bow, and I saw her whole starboard bow. *I have not at any time said she would pass me one-half a mile inside of me.* I do not know really how far. I saw this vessel two points on my starboard bow. I saw the whole starboard side of that ship. Had she proceeded on that course as she was doing at the time I came out of the lavatory there would have been no collision.

Q. How do you reconcile your statement that she would not have passed half a mile to your starboard with the statement of your chief officer who has testified she would have passed three-quarters of a mile?

A. I do not know about any testimony he gave.

Mr. DENMAN. Objected to on the ground it calls for the conclusion of the witness.

A. (Contg.) She must have hauled out; she must have changed her course from the first time I saw her.

Q. Do you mean the 'Beaver'? A. Yes, sir.

Mr. CAMPBELL. Q. And borne in towards you?

A. Yes, sir; she certainly must have, or she could not have gone so close.

Q. How far would you say now after you had made this drawing the 'Beaver' would have passed you?

A. When I first saw her she should have passed us about a mile; when I saw her after coming out of the lavatory she should have passed us a good safe distance.

Q. What is that? A. A good safe distance.

Q. What is that?

A. Any distance but well clear of each other.

Q. What is your judgment of the distance she would have passed your starboard when you came out of the toilet? A. I cannot say.

Q. What is your judgment?

A. A good safe distance.

Q. What do you call a good safe distance?

A. Where there is room for two bad steering vessels to pass each other.

Q. Was your vessel of that type?

A. My vessel steers well.

Q. *What was the distance in feet that you would say she would have passed you?*

A. *I cannot answer that.*

Q. *You cannot or you don't want to?*

A. *I refuse to answer that.*

Mr. DENMAN. I don't think there is any need for that suggestion. Go on and answer it.

A. *No, sir, I am not going to answer such questions as that.*

Q. Why not? A. What is the sense of it?

Q. He has a right to have his question answered.

A. That is all right. If I put it in half miles or feet I would have to say something—I would have to go down and figure it.

Q. The reason you do not want to answer it is you have not figured it?

A. I have not the material at hand to.

Mr. CAMPBELL. Q. Until you laid it down on the chart here and was checked up by your own counsel, *you still had in mind she would have passed you half a mile?* A. *I never said that.*

Q. Up to the time you took hold of the chart you still had in mind she would pass you one-half a mile to your starboard?

A. *I never said she would pass one-half a mile abeam of me.*

Mr. DENMAN. I think the witness has a right to go back and see.

The WITNESS. I do not care about that. It has nothing to do with me. I am telling the truth.

Mr. DENMAN. That is all going into the record.

Mr. CAMPBELL. Mr. Reporter, will you turn back to that part of the witness' testimony and read it? (Thereupon the Reporter reads the testimony.)" (Ap. 164-7).

"Further Redirect Examination.

Mr. DENMAN. Q. At Mr. Campbell's request there was read to you your testimony given to him in regard to the position of the two vessels as you saw them when you came out of the lavatory, and from that testimony it appears that *you stated that you thought from the position of the vessel as you saw her when you first looked out after leaving the lavatory that she would pass you half a mile on your starboard side?*

A. *I did make that statement.*

Q. I will ask you whether or not that is correct.

A. When I came out of the lavatory if she continued on her course, *she should have passed me roughly half a mile.*

Q. How could she do that two points on your starboard bow?

Mr. CAMPBELL. Objected to as being cross-examination of his own witness.

A. When I came out of the lavatory, *that is just a rough guess*; judging her appearance when I came out of the lavatory she was going full speed at the time; she might have passed in that neighborhood, it might be less, and it might be

more; at any rate she had plenty of room to pass if she continued on her course; that is my statement from beginning to end.

Q. And you say your impression as to half a mile cannot be true as an exact figure?

Mr. CAMPBELL. Objected to as not proper re-direct examination; it is cross-examination and a leading question.

A. As to what exact figure?

Mr. DENMAN. Q. As to half a mile being the distance——

A. (Intg.) By direct bearing from my vessel?

Q. Bearing two points as you looked at her and saw her two points on your starboard bow.

A. I said two points or more on my starboard bow; somewhere in that neighborhood. When I came out of the lavatory the vessel should have passed well clear of us had she continued on her course. That is the shortest way to put it. When I first saw the vessel she was five or six miles off, somewhere in that neighborhood. Then, bringing it up again when I first saw her, it confused me. When I first saw the vessel she was five or six miles off, which I stated here at different times, and then you again bring it up when I first saw her. All you want is the truth, isn't it?

Q. Yes. When you first saw her, in your judgment she was going to pass you a mile off?

A. Yes, sir. *She should have passed us a mile off.* She was bearing a point on our bow, and should have passed one mile off. When I next saw the vessel if she had gone on about her business she would have passed us well clear. I would not say how many feet. I might go back over the course and take my tape measure and measure it off." (Ap. 168-9).

If the testimony of the master and mate of the "Necanicum" is to be given credence, and that of the officers of the "Beaver" rejected, then this court will

accept a version of the collision whereby it is said that the "Beaver", a large passenger steamer, proceeding southbound along the coast of California in the day time, on a course which she had traversed for years, suddenly and in defiance of a passing whistle to the contrary from the "Necanicum", altered her course from a point, $1/2$ to $3/4$ of a mile ahead and from $1/2$ to $3/4$ of a mile to starboard of the "Necanicum", across the course of the latter. No reason of any kind could exist for such a change of course.

It would have been an act of wildest insanity, for a child would have instantly known that it would render collision imminent. Had such a maneuver been charged to the "Beaver" if she had approached *slightly* to starboard, then there might have been some ground for saying that, perhaps, the testimony of those on the "Necanicum" was true, but when it is stated that she made the change in violation of positive rules of navigation when she was on a parallel course, which, if adhered to, would have carried her from $1/2$ to $3/4$ of a mile to starboard of the "Necanicum", it is impossible to give any credence to the testimony in the face of proof of a more rational course of navigation. The question as to whether this version of the collision is to be accepted as true is one that this court must decide. It is of greatest importance because, if the testimony is not accepted, it goes to the very vitals of the "Necanicum's" case.

This is not the first time that the courts, and particularly this court, have been asked to accept similar charges of change in course as the cause of collision.

In the early case of

Haney v. Baltimore Steam Packet Co., 23 How.
287, 291,

the Supreme Court characterized such an excuse as stereotyped and usually resorted to for the purpose of justifying a careless collision, *always improbable and generally false*.

This court, in

The Dauntless, 129 Fed. 715,

refused to accept a less exaggerated version of a collision, referring with approval to *Haney v. Baltimore*, etc., in the following language:

“In *Haney v. Baltimore Steam Packet Co.*, 23 How. 287, 291, 16 L. ed. 562, which was a case in admiralty, where the question raised was very similar to the case in hand, the answer admitted the collision, and the result of it, and it also admitted that the schooner was seen at a distance of 2 or 3 miles; that the steamer was proceeding at a rate of 14 miles an hour, heading due north, and the schooner holding her course nearly due south; but it alleged as an excuse that, while the steamboat and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bows of the steamer. The court said: ‘*This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false.*’” (p. 721.) (Italics ours.)

The rule is one of reason. Apply it to this case, and will any one deny that it is improbable that the “Beaver” so radically altered her course? Certainly not. Why *would* her master do it? What purpose could it serve? He had the miles of water to port.

No reason, except criminal carelessness amounting to insanity, could explain it.

Yet, if the "*Necanicum*" approached the "*Beaver*", as the officers of the latter state, and starboarded her helm, just as the mate ordered, and as the master admitted was done, the collision would have been brought about as stated by the witnesses for the "*Beaver*". That the "*Necanicum*'s" helm was starboarded is admitted. The moment it was altered, it of necessity began to swing the "*Necanicum*" in the direction stated by those on the "*Beaver*". Those on the "*Necanicum*", of course, deny that she changed her course to port as much as claimed by the "*Beaver*", but it is more reasonable to believe that those on the "*Necanicum*" erred in this recollection of the distance the "*Necanicum*" swung under her starboard helm, than it is that the "*Beaver*" ever made such an insane alteration of course. Common sense and the rule of reason supports the "*Beaver*'s" version.

If the court will but read the deposition of Theodore J. Hewitt, a lawyer of standing and of high character, residing in Portland, who was a passenger upon the "*Beaver*", we feel assured that it will find it impossible to say that the "*Beaver*" ever made the alteration of course attributed to her. He detected her change to starboard, and says that immediately she began to reverse, for he was over the stern of the vessel and could feel the vibration of her engines. It is certain that if the "*Beaver*" had been at the place and distance attributed to her ($1/2$ to $3/4$ of a mile ahead and to starboard) she would never have been

struck by the "Necanicum" at the admitted angle of impact, if she was reversed at the time with respect to the signals and collision stated by Mr. Hewitt, and the officers of the "Beaver".

Thus, the complete variance in the testimony of those on the "Necanicum" as to the whistles sounded by the "Beaver" points to lack of veracity. The "Beaver" had a large deep whistle (Ap. 289). Captain Seike, a witness for the "Necanicum", so testified (Ap. 770). She certainly was blowing fog signals upon it for some time prior to the collision as Mr. Hewitt stated (Ap. 187), yet no one on the "Necanicum" would admit hearing it (Ap. 48, 49). The mate emphatically denied that he *ever* heard the one blast, which he "surmised" (Ap. 69) was given as a cross signal to his alleged two whistles. Instead of sound, he says that he distinctly saw the steam emitting (Ap. 68-9, 74, 78).

"Q. You say you could see the steam, but *you could not hear the whistle?*

A. *No, sir.*

Q. What was the steam you saw, from her whistle?

A. Apparently from her whistle.

Q. Was her whistle in plain view?

A. The smokestack was visible and the whistle must have been there.

Q. *The steam you saw coming from the whistle?*

A. *Yes, sir.*" (Ap. 68-9).

* * * * *

"Q. Did you watch the steam to see it?

A. *I watched the steam; no sound emitted.*" (Ap. 78).

The lookout, said to have been on the fore-castle, claims to have heard no whistle from the "Beaver" (Ap. 579-580) and a sailor working in life boat back of the bridge claimed that he even saw water coming from the whistle (Ap. 596-7, 601, 605-6), an impossibility because of the whistle's construction (Ap. 436).

On the other hand, a sailor on deck between the bridge and fore-castle testified that he heard the "Beaver's" one whistle (Ap. 97, 99), and the master on approaching the bridge, farthest away from the "Beaver", stated that he heard her whistle distinctly.

"Q. *You say you heard an answer to your two whistles, you heard one whistle from the 'Beaver'?*

A. *I did.*

Q. *Distinctly?"*

* * * * *

"A. I heard the blast of the whistle.

Q. You had no difficulty in hearing it?

A. None whatever." (Ap. 139).

The undisciplined condition of affairs aboard the "Necanicum" is further shown by the card game in session in the fore-castle. From the testimony of the seaman, Gannan, one of the players (Ap. 108-110, 116), and the chief engineer, Slater, a looker-on, the game continued without concern as to what peril might be threatening the "Necanicum" until the collision happened and all were thrown to the deck. The chief engineer, whose admitted post of duty in an emergency was in the engine-room, claims to have known from her fog whistle that the "Necanicum" was proceeding in a fog. He admitted that he heard her two blast passing whistle and paid no attention to it, and says

that thereafter he felt the engines reverse and heard three whistles given on the "Necanicum's" whistle. *And yet he never moved from the card game until the vessels were together* (Ap. 647-650). Even after the vessels were in collision, if we were to believe the seaman, Gannan, he gathered himself together off the deck, and without leaving the forecastle to ascertain the name of the other colliding vessel, went below to see whether or not the "Necanicum" was leaking (Ap. 114).

Here were five men on the decks of the "Necanicum": *the two best stationed to hear any whistles given by the "Beaver", one the navigating officer who blew the "Necanicum's" alleged whistles, the other the lookout whose duty it was to hear and report approaching whistles, did not hear any whistle from the "Beaver", but saw steam, and the seaman in the life boat who "saw water"; the other two, not on watch, and less advantageously placed, heard the one whistle distinctly.* What shall be said of the accuracy of such testimony? It is hardly of a character to stamp those witnesses as sufficiently credible to justify the court in accepting their version of the collision in face of the principle enunciated in

The Dauntless, supra.

Rather it bespeaks a chaotic condition aboard the "Necanicum", which will amply justify this court in refusing to find that the "Beaver" was swinging across the course of the "Necanicum" as contended.

Considering the high improbability of such a maneuver as is charged by those on the "Necanicum" to the "Beaver", the inexplainable discrepancies in the testimony of the "Necanicum's" witnesses as to the whistles heard and not heard from the "Beaver", the undisciplined condition disclosed by the card game and its absorbing influence over its participants, the admitted starboarding of the "Necanicum's" helm, the mutilation of the "Necanicum's" bridge log affecting the matter of her speed in the fog at the time of collision, and the disinterested testimony of Mr. Hewitt, we submit that the record will not justify this court in disregarding the rule of probabilities which it recognized and applied in

The Dauntless, supra.

The probabilities of the causes of the collision and the weight of the evidence, necessitates, we respectfully submit, the court holding that the collision was caused under the circumstances testified to by the officers and crew of the "Beaver", and that the "Necanicum" was in fault in altering her course to port instead of to starboard.

The "Necanicum" failed to stop in time to prevent the collision.

The weight of the evidence shows that the "Necanicum" had not stopped prior to the moment of impact between the two vessels.

Here again, however, upon this question we have the same discrepancies between the master and the mate of the "Necanicum". The latter, the officer who could

not hear any whistle from the "Beaver" although he was looking at the whistle and saw the steam, whereas the master farther away distinctly heard the sound, glibly testified that the "Necanicum" was going astern at a speed of three or four miles. Note his statement:

"Q. Had you succeeded in reducing your speed between the time that the order full speed astern was given and the collision?

A. Yes, sir; rapidly astern, *the vessel was going rapidly astern.* (Ap. 35).

* * * * *

Q. *How long* had your vessel gained sternway before they actually came together?

A. Authentically I could not state, but I judge she gained sternway *three-quarters to one mile.*

Q. *How fast* was she going sternway at the time of the collision, astern??

A. *Three or four miles probably.*

Q. *Astern?*

A. *Yes, sir.*" (Ap. 80).

The master, on the other hand, testified as follows:

"Q What is your judgment about it, as to whether or not she was going three or four knots an hour astern?

A. At that particular time I would say she was going astern—I could not give you the speed astern; she was going astern.

Q. She did not have any appreciable sternway that you could see?

A. She had.

Q. She had appreciable sternway?

A. *Yes, sir, we had no means of knowing she was going astern.*

Q. What was the speed astern at the time of the collision?

A. *That I cannot say.*

Q. Is it because you cannot, or you do not want to?

A. *I would not say.*" (Ap. 145).

Under such evidence, is there any certainty that the "Necanicum" had sternway? The master, on the bridge, says that they had no means of knowing that she was going astern; the mate testifies that her speed astern was three or four miles, nearly one-half her normal full speed. It seems unnecessary to point out that such testimony is worthless, but the merest guess work (to be charitable), and comes from keenly interested witnesses not given, as their evidence throughout shows, to impartiality toward the "Necanicum". Had the master any positive knowledge of her having gained sternway, his own self interest would have quickened him to assert it with unmistakable clearness.

Those on the "Beaver" declare with equal asseveration that the "Necanicum" had headway, striking the "Beaver" at an angle of about 45 degrees (Ap. 296).

But we are not required, nor do we, to rely upon the evidence adduced from those having personal interest, as every officer and sailor does, in the outcome of litigation. The court is fortunate in having the frank and comprehensive testimony of a man of good character and standing, a keen observer of high intelligence, who saw the two vessels when they were a considerable distance apart before the collision and closely watched their movements until after the actual impact. We, therefore, commend the court to a careful consideration of the deposition of Mr. Hewitt, appearing on pages 184 to 202 of the Apostles, together with the drawing showing the relative positions of approach of the two vessels, attached to the deposition as an exhibit.

From Mr. Hewitt's testimony it appears that he was sitting on the upper deck of the "Beaver" at the extreme stern watching the ship's carpenter repairing some seats; that they ran into fog, quite a heavy bank, and just before they entered it, the "Beaver" began to blow fog signals. After a little while, there was one long blast blown, and the carpenter raised up and looked across the ship towards the port side. Mr. Hewitt thereupon turned to the port side to watch the ship go by, for he knew that it was a whistle to pass to port. As he kind of swung around, the "Beaver" gave three short, sharp blasts, and the ship began to tremble all over. He sensed that something was wrong; the carpenter dropped his tools and ran directly across the ship to the port side. Mr. Hewitt followed suit and ran down along the port side until he came to the life boats, and from there he saw the "Necanicum" "sitting" almost at right angles ahead, quite a little bit ahead. He estimated the distance at 200 yards. He stood there looking at them and didn't think of a collision until they kept drifting closer and closer, and as he stood there he said to himself aloud: "They are going to strike, sure as the devil." And he stood there, and "*then they came right on and crashed together*". The impact produced a loud crashing noise, and listed the "Beaver" quite a good deal to the right, and his little boy came running back to him, frightened and crying.

As near as he could judge then, they (the "Necanicum") were headed a little towards the "Beaver",

and the latter's bow "seemed to be turning to the right continually". He said:

"Q. And your boat kept drifting?

A. *Our boat had practically come to a standstill, and theirs came right on.*" (Ap. 199).

He heard no whistles from the "Necanicum" until after the collision (Ap. 184-202).

Mr. Hewitt's testimony not only corroborates that of the officers and crew of the "Beaver" as to the positions and maneuvers of the two vessels leading to the collision, but it establishes beyond all question that the "Necanicum" had headway to the moment of impact, for without headway the collision could never have occurred. Mr. Hewitt's description was a most human one by a man of observation, and no possible reason exists for this court refusing to give it full credence. Certain it is, then, that when he saw the "Necanicum", she was off the port bow of the "Beaver" when the "Beaver" was swinging to starboard. *Now, with the stem of the "Beaver" pointing to starboard of the stem of the "Necanicum", and with the "Beaver" continuing to turn to starboard, the two vessels could never have come together at a point 12 feet abaft the "Beaver's" stem without the "Necanicum" having headway to the moment of impact.* Take the drawing made by Mr. Hewitt, roughly illustrating the positions of the two vessels with respect to each other when he first saw them! (Ap. 195-6). With the vessels in those respective positions, and with the "Beaver" continuing ahead and swinging to starboard, *it would be a physical impossibility for the collision to happen without the*

“Necanicum” having headway to the moment of collision.

This evidence, then, establishes to a demonstration that the “Necanicum” did not stop before the collision. *Tested by whatever rule of law you will, it equally condemns her in fault with the “Beaver” for the collision.* Having breached a statutory rule of navigation, the “Necanicum” has not, and cannot, sustain the burden of proving that the collision could not by any possibility have been caused by the speed at which she was proceeding in the fog. On the contrary, her speed was a direct contributory cause, for she did not stop in time to prevent the collision.

Further corroboration of the fact that the “Necanicum” was under headway at the time of collision is found in the nature of the damage inflicted upon both vessels, and in the effect of the collision blow upon those on the “Necanicum”.

According to the “Necanicum’s” version of the collision, the “Beaver” cut across her bow from a position at least half a mile to starboard and half a mile ahead. If this were true, then the blow which the “Necanicum” would have received would have been a glancing one, and not a direct blow. But the blow was a direct one, for it cracked the “Necanicum’s” rudder post; it moved her port oil tank *forward* three inches and started her starboard one (Ap. 215). Both were filled at San Pedro (Ap. 624). It threw the assistant engineer *forward* about five feet (Ap. 623), and knocked a sailor almost the full length of a life boat in which he was working, shot him along the top of the seats on his

stomach like (Ap. 591, 609). The lookout was thrown off the forecastle head (Ap. 573). Those effects upon the "Necanicum" convincingly indicated that the blow to her took a fore and aft direction. If it had been but a glancing blow from the "Beaver" crossing the bow of the "Necanicum", it doubtless would have turned the "Necanicum" just as she was turned by the "Beaver's" headway, but the forward momentum to the objects and persons on the "Necanicum" would not have been present. Manifestly, that required headway on the "Necanicum", as did the crush to her stem (Ap. 531). (See the testimony of Capt. Pillsbury and Messrs. Dickie and Evers, Ap. 209, 479, 520).

Had the "Necanicum" been moving sternward, the turning effect of the glancing blow would have been still less.

The blow of the collision was severe enough to list the "Beaver" to starboard, as so clearly appears from the deposition of Mr. Hewitt (Ap. 189). This, together with the character and extent of the damage inflicted upon the "Beaver", showed conclusively that the "Necanicum" had material headway. It will serve no purpose to detail the damage, but if the court will give consideration to the testimony of Captain Pillsbury and Messrs. Dickie and Evers, in conjunction with the photographs offered in evidence showing the damage, conviction, we submit, will quickly follow that the damage to the "Beaver" could only have resulted from a direct blow from the "Necanicum". The turning of the "Beaver's"

forefoot and the twisting of her stem could only have followed from a direct lateral thrust. It could never have been caused by a glancing blow upon the "Necanicum", dead in the water, and less so under sternway. (See the testimony of Captain Pillsbury and Messrs. Dickie and Evers, Ap. 209, 479, 520.)

The experts called for the "Necanicum" recognized this, for out of their fertile imaginations evolved the ridiculous theory of the "Beaver" "impaling" herself upon the retreating stem of the "Necanicum". (See the testimony of Mr. Hough and Captain Rinder, Ap. 678, 729).

The conclusion is unavoidable from all of the evidence adduced and from this array of facts and circumstances that the "Necanicum" had material headway when she struck the "Beaver". She most certainly was neither stopped nor under sternway, for had she been, the collision not only would never have happened, but the character of resulting damage could never have been inflicted upon either vessel by any such collision as the witnesses for the "Necanicum" would have this court believe occurred.

We respectfully submit, therefore, that the "Necanicum" was in fault in that she altered her course to port instead of to starboard as the exchanged passing signals required, and did not stop in time to prevent the collision.

IV.

THE "BEAVER" WAS NOT IN FAULT FOR THE COLLISION IN THAT SHE WAS NOT PROCEEDING AT AN IMMODERATE SPEED IF THE COURT SHOULD FIND THAT A FOG DID NOT PREVAIL.

If the court should be of the opinion that a fog sufficient to bring into application rule 16 did not prevail, for the officers and crew of the "Beaver" stated that they were able to see the "Necanicum" at a distance ahead of about a mile (Ap. 293), then, we submit, the "Beaver" was in no respect responsible for the collision.

Under those conditions, a port to port passing of the vessels under exchanged whistles of a single blast such as were given, was proper. In those circumstances, there was nothing improper in the "Beaver's" speed, for her normal full speed was sixteen knots (Ap. 305-6). Save for the error of excessive speed in the fog, the collision was caused by the negligent starboarding of the "Necanicum".

We respectfully submit that the District Court erred as assigned, and that, if this court should find that fog prevailed, the decree of the District Court in cause No. 2969 herein should be reversed and said cause remanded with instructions to enter a decree in favor of appellant; that, if this court should find that fog did not prevail, the decrees of the District Court in causes Nos. 2969 and 2970 herein should be reversed and said causes remanded with instructions to enter a

decree in favor of appellant in cause No. 2969 and to dismiss the libel in cause No. 2970.

And that appellant may recover its costs herein incurred, and have such other and further relief as shall be deemed meet and equitable.

Dated, San Francisco,

May 19, 1917.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.